

In the Supreme Court of the United States

No. 78-635

ACOUSTI ENGINEERING
COMPANY OF FLORIDA,

Petitioner,

v.

JOHN H. SEA and CLAY MORT, et al,

Respondents.

**BRIEF OF JOHN H. SEA AND CLAY MORT, ET AL,
IN OPPOSITION TO PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE FIFTH CIRCUIT**

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QUESTION PRESENTED

**MAY A CONTRACTOR AVOID PAYMENT OF
FRINGE BENEFITS TO UNION TRUST FUND
PURSUANT TO TERMS OF COLLECTIVE BAR-**

GAINING AGREEMENT, DURING INTERIM FROM EXPIRATION DATE OF PREVIOUS BARGAINING AGREEMENT TO FORMAL EXECUTION OF NEW AGREEMENT, ON BASIS THAT PAYMENT WOULD BE ILLEGAL WITHOUT WRITTEN AGREEMENT, WHERE NEGOTIATIONS FOR NEW AGREEMENT BEGAN BEFORE EXPIRATION OF OLD AGREEMENT, CONTRACTOR HAD PAID SOME FRINGE BENEFITS PURSUANT TO NEW AGREEMENT, AND OTHERWISE HAD OPERATED UNDER TERMS OF NEW AGREEMENT PRIOR TO FORMAL EXECUTION?

STATEMENT OF CASE

Petitioner, Acousti Engineering Company of Florida, was a member of an association of general contractors that negotiated collective bargaining agreements with, among others, the carpenters' union.

Prior to May 1, 1974, Acousti and the carpenters had operated under a collective bargaining agreement negotiated as outlined above. Prior to the expiration date of May 1, 1974, a new collective bargaining agreement was negotiated between the union and the association of general contractors, and was approved by them.

Acousti paid some fringe benefits as set forth in the new agreement, but then stopped, although it continued to otherwise abide by the terms of the new agreement.

The trustees of the union fringe benefit trust fund filed a complaint against Acousti for the unpaid benefits, and

Acousti counterclaimed for the sums it had already paid. The trial court awarded judgment for Acousti, holding that fringe benefits paid without a signed written agreement were illegal. The District Court of Appeal for the First District of Florida reversed that judgment, and the Florida Supreme Court denied Acousti's petition for a writ of certiorari, and the instant petition was filed.

ARGUMENT

Respondent would submit that the First District Court of Appeal correctly reversed Acousti's judgment, and that decision is not in conflict with any holding of this Honorable Court.

As the First District pointed out in its decision (Petitioner's Appendix, p. A-6 to A-9):

"Acousti and the union operated under a collective bargaining agreement that terminated on May 1, 1974. A new agreement was negotiated between an association of general contractors of which Acousti was a member and the union, which provided that the employer would make certain payments to trust funds designated as an apprenticeship fund, a health and welfare fund, and a pension and vacation fund; such being customarily referred to as 'fringe benefits.' This 'new agreement' was reached during the latter part of April, 1974. However, Acousti did not formally sign the written agreement until September 13, 1974, although during the period intervening from May 1, 1974, Acousti made substantial payments to the trust funds in accordance with the provisions of the written agreement that it had not executed.

The trial court held that Acousti's payments for fringe benefits violated the provisions of 29 U.S.C. §186 (c)

(5)(B) and (7) (Taft Hartley Act of 1947)¹ and assessed damages against the union trust fund in the sum of \$28,356.48; hence this appeal.

After extensive investigations, Congress discovered abuses which seemed to be inherent in funds created and maintained by contributions exacted from employers, but which were administered by union officials without any obligation to account to the contributors or to union membership. Thus, an essential provision of the Taft Hartley Act of 1947 prohibited the contribution by an employer to any union except in narrow circumstances. The narrow exception with which we are here concerned is found in the following provision, viz:

'. . . (c) The provisions of this section shall not be applicable . . . (5) with respect to money . . . paid to a trust fund . . . *Provided* . . . (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer. . . .'

The trial court held that the above cited provisions rendered the fringe benefit payments to have been illegal.

Acousti argues in its brief that *Moglia v. Geoghegan*² and *Bricklayers, Etc., U. 15, Fla. v. Stuart Plaster Co., Inc.*,³ mandate an affirmance. We do not agree. *Moglia* involved a claim to a pension fund which the employer had made contributions. However, an important fact is that the non-union employer in *Moglia* had never entered into a collective bargaining

1. Labor Management Relations Act of 1947, Pub. L. No. 101, §302, 61 Stat. 136 (1947).

2. *Moglia v. Geoghegan*, 403 F.2d 110 (2nd Cir. 1968), cert. den. 394 U.S. 919, 89 S.Ct. 1193, 22 L.Ed.2d 453 (1969).

3. *Bricklayers, Etc., U. 15, Fla. v. Stuart Plaster Co., Inc.* 512 F.2d 1017 (5th Cir. 1975).

agreement with the union. Likewise, *Bricklayers* is not applicable. In *Bricklayers*, the collective bargaining agreement was in numerous respects in clear violation of the Taft Hartley Act and, as a result of such violations, the trust funds had been flagrantly mismanaged. The facts in *Bricklayers* amply demonstrate the foresight of Senator Taft's explanation that 'the purpose of the provision is that the welfare fund shall be a perfectly definite fund, that its purposes shall be that each employee can know what he is entitled to, can go to court and enforce his rights in the fund, and that it shall not be, therefore, in the sole discretion of the union or the union leaders and usable for any purpose which they may think is to the advantage of the union or the employee.'⁴

(1) Unlike the facts in *Moglia*, Acousti had a valid labor agreement with the union prior to May 1, 1974. Ninety days prior to the expiration of this agreement, negotiations were begun between the association of contractors and the union. A representative of Acousti participated in these negotiations, resulting in the formulation of a written contract which was ratified by the union a few days prior to May 1, 1974. Acousti employed the union members after May 1, 1974; paid them wages and some fringe benefits pursuant to the written contract; and on September 13, 1974, signed the written contract. That the subject written instrument is in compliance with the Labor Management Relations Act has not been questioned. Applying these facts to the legislative purposes of the subject statute, we conclude that Acousti, by its acts, ratified the subject contract as of May 1, 1974. The Taft Hartley Act was enacted as a shield for all parties; not as a sword for Acousti's use."

4. Id. quoting 93 Cong. Rec. 4876 (1947).

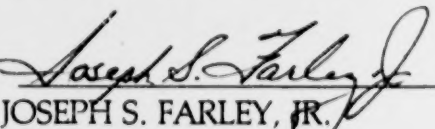
CONCLUSION

In conclusion, it is submitted that Acousti clearly ratified the new agreement by its actions of participation in negotiations, payment of substantial fringes pursuant to the new agreement, and otherwise operating under the terms of said agreement. Acousti cannot now be heard to disavow that portion of the contract it may have found less attractive, simply because it had delayed its formal execution thereof.

The Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit should be denied.

Respectfully submitted,

MAHON, MAHON & FARLEY

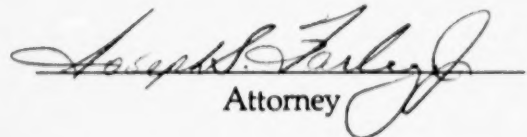
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Albert S.C. Millar, Jr., Esquire, 1239 King Street, Jacksonville, Florida 32204, by U.S. Mail, this 27 day of November, 1978.


Attorney